IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1991 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRECIOUS CARRYING CORPORATION

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1991 of 1982

MR ARUN H MEHTA for Petitioners No. 1-2

MR BY MANKAD, AGP for Respondents No. 1-2

MR ASIM PANDYA, for Respondent No. 3

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 26/02/2002

ORAL JUDGEMENT

1. Precious Carrying Corporation Pvt.Ltd., and others, petitioners have filed this petition with a prayer that respondent No.1, Chief Secretary, General

Administration Department, Gandhinagar, respondent No.2 Director of Prohibition, Ahmedabad, and respondent No.3 Collector of Central Excise and Customs, Ahmedabad be restrained from interfering with the trucks owned by the first petitioner and or hired by them from passing through the territory of Gujarat with liquor loaded therein for the purpose of delivery thereof in the State of Maharashtra. The petitioners also challenged the validity of Rule 10 of the Gujarat Through Transport Rules, 1966 (hereinafter referred to as `the Rules') on the ground that said rule do not impose reasonable restrictions nor restrictions are in public interest and even on this ground the said Rules violate the guarantee of free trade, commerce throughout the territory of India as guaranteed by Article 301 of the Constitution of India.

2. The facts giving rise to this petition are as under:-

2.1 The first petitioner is carrying on business of common carrier and as such common carrier, they transport goods all over India from place to another. The first petitioner submitted that for the purpose of carrying out the above business, the Company owns about 17 goods carriers and also it has got about 500 trucks owned by its associates all over India. It has been submitted that the first petitioner is carrying on business on a large scale.

2.2 It has been stated that in Udaipur there is a brewery company which manufactures several varieties of liquor. The sales of this brewery are all over India and the goods produced by it have acquired reputation with the result that these goods have a large demand. The brewery had given contract for transporting goods exclusively to the first petitioner from their factory at Udaipur to all parts of India. Pursuant to the said contract the first petitioner is transporting goods of the said brewery all over India including Gujarat.

2.3 It has been stated in the petition that the goods which are manufactured in Udaipur have also got to be transported to the Maharashtra State including Bombay and for that purpose the first petitioner company has to use National Highway No.8 which starts from Delhi, passes through Rajasthan including Udaipur then proceeds to Ratanpur including Udaipur, then proceeds to Ratanpur which is the border town between Gujarat and Rajasthan. The National Highway thereafter proceeds through Gujarat territory and passes through Ahmedabad, Baroda and

various other towns in the Gujarat State and ultimately enters the limits of the Maharastra State. In view of the same the first petitioner has to pass through the National Highway which passes through State of Gujarat. It has been stated that petitioner hold national permit issued under the provisions of the Motor Vehicles (National Permits) Rules, 1975.

2.4 It has been contended in the petition that the trucks owned by first petitioner and hired by the first petitioner and which carry liquor from the brewery at Udaipur are not allowed to pass or even enter the State of Gujarat. These trucks are stopped by the respondents herein without any authority of law whatsoever at Ratanpur town which is situated on the border of the two States and not allowed to enter the limits of Gujarat State.

2.5 It has been stated that there were permits issued to common goods carriers Statewise but this hampered free flow of goods and hampered inter-state trade as a result of which the Motor Vehicles (National Permits) Rules, 1975 came to be enacted. Similarly system of Zonal permits was introduced so that there is smooth flow of transit from one State to another. The petitioner has challenged the validity of Rule 10 of the Rules and stated that Rule 10 is beyond the competence of the State Legislature and as violative of the fundamental rights of the petitioners guaranteed under Articles 14, 19 and 301-A of the Constitution. It has been stated that excise escort which shall be provided on payment by the transporter of the cost of the same in advance and on an application being made in this behalf by the transporter to the local prohibition and excise officer of the charge in which the place where he consignment shall first enter by road in the State of Gujarat is situated."

2.6 For challenging the said action the petitioner has relied upon Entry 31 of List II of Schedule III of the Government of India Act reads as under:

> "31.Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III."

2.7 Thereafter he has referred to Entry 8, List II, Schedule VII of Constitution of India reads as under:

"Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

2.8 He has also relied upon provisions of the Bombay Prohibition Act, 1949 (hereinafter referred to as `the Act') which provides the law relating to the promotion and enforcement of and carrying into effect the policy of prohibition in the State of Gujarat. Sec.29 of the Act provides procedure to be followed through transport which reads as under:

"Sec.29 The through transport -

(a) of any consignment of any intoxicant, hemp, denatured spirituous preparation, mhowra flowers or molasses by a railway administration or by any steamer, ferry road, transport or air service, or

(b) of any intoxicant, hemp, denatured spirituous preparation, mhowa flowers or molasses, otherwise than by way of consignment,

shall be subject to such conditions as may be prescribed.

2.9 He has also relied upon Sec.143 of the Act which reads as under:-

"Sec.143 The State Government may make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenues."

2.10 It may be noted that clause (1) of sub-section(2) of Section 143, read with sec.29 of the Act, and all other powers enabling it in that behalf and in supersession of the Bombay Through Transport Rules, 1949, the State Government makes the rules called the Gujarat Through Transport Rules, 1966.

Sec.2(d) provides definition "through transport" means the transport from a place outside the State to any other place outside it through the intervening territory of the State, whether by way of consignment or otherwise than by way of consignment."

Rule 3 provides passes for the through transport.

Rule 4 provides rule 3 not apply in certain cases.

Rule 5 provides receptacles to be closed and sealed.

Rule 6 provides inspection of pass.

Rule 7 provides prohibition of consumption in transit.

Rule 8 provides seal not to be broken.

Rule 9 provides consignment to be in charge of a responsible authority.

Rule 10 provides as under:

"Rule 10. Through transport by road to be under excise escort:- (1) No consignment shall be transported by road through the intervening territory of the State unless it is accompanied by the excise escort which shall be provided on payment by the transporter of the cost of the same in advance and on an application being made in this behalf the transporter to the local Prohibition and Excise Officer of the charge in which the place where the consignment shall first enter by road in the State of Gujarat is situated."

2.11 The petitioners have challenged the validity of Rule 10 on the ground that the said rule imposed unreasonable restriction on common carrier by road transport. It was further submitted that there is no nexus sought to be achieved by imposing the restriction. It was further submitted that as a common carrier, they are entitled to carry on their business throughout the territory of India and they cannot be discriminated against any such business only because they have to carry the intoxicating liquors through the territory of the State of Gujarat. The petitioner therefore submitted that under the provisions of the rules the petitioner firstly to obtain a permit from the Collector of the place outside Gujarat from where the goods were to be loaded, forward an application with such certificate seven days in advance to the local Prohibition and Excise Officer of the charge in which place the consignment shall first enter who would make provision for the excise escort, by itself imposes unreasonable restriction. It was further submitted that there is no corresponding

obligation is cast upon the local Prohibition and Excise Officer to provide as soon as an application is received for excise escort and to comply with the order formalities. Such excise escort and other formalities can be gone into by the local Prohibition and Excise Officer at his sweet will and may be, in some cases, weeks and months after.

2.12 In view of the same it was submitted that such unguided and unrestricted absolute power conferred upon the local Prohibition and Excise Officers by the State Government imposes unreasonable restriction upon the petitioners' right to carry on trade or business and therefore the said Rule 10 imposes restrictions which are unreasonable and is void ab initio as violative of Article 19(1)(g) of the Constitution of India. Restrictions though of by Article 301 are contained in Articles 302 which deals with the power of the Parliament to impose restrictions on trade, commerce and intercourse provided they are required in public interest. Article 302 would not enable the State Legislature and/or the State Government to impose any such restriction on interstate trade, commerce or intercourse between one State and another or within any part of the territory of India. Article 303 imposes restriction on the legislative powers of the Parliament and the State Legislature to make any law giving or authorising the giving of any preference to one State over another. Article 304 is an overriding article over articles 301 and 303 and empowers the legislature of a State to impose restrictions on trade, commerce and intercourse amongst States provided such restrictions are reasonable and in public interest. Further, Article 304 says that no bill or amendment of the State Legislature for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. Article 305 deals with the saving of existing laws etc.

2.13 It was submitted that in any event the restrictions which are imposed by the said Rules of 1966 and in particular 10 thereof do not impose reasonable restrictions nor restrictions are in public interest and even on this ground the said Rules violate the guarantee of free trade, commerce and intercourse throughout the territory of India as guaranteed by Article 301 of the Constitution.

3. Mr.B.Y.Mankad, learned AGP appeared on behalf of the respondents No.1 and 2. He has relied upon the affidavit-in-reply filed on behalf of the State in this

behalf.

3.1 Learned counsel for the respondent has submitted that the excise escort can be provided immediately on entering the excisable articles into the State and the transporter of such article will not have to wait for excise escort for a long time. In order to avoid the delay for providing excise escort, a provision has been made for making application seven days in advance. It was also submitted that as stated in para 7 of the petition the Superintendent of Prohibition & Excise, Sabarkantha, Himmatnagar is providing such escort without delay on payment of escort charges and therefore it was denied that Rule 10 imposes restrictions which is unreasonable. Thus the said Rule 10 is valid and not violative of Article 19(1)(g) of the Constitution of India.

3.2 It was submitted that Sec.29 of the Bombay Prohibition Act, 1949 which relates to through transport was substituted by Bombay Prohibition (Amendment) Act, 1959 (Bombay XXII of 1960). The said Act was assented by the President of India on 28th April, 1960. Thus the compliance of Article 304 of the Constitution has already been complied with.

3.3 He further submitted that the said rules have been framed in exercise of the powers conferred by Section 143 of the Act. sub-section (4) of Section 143 provides that all rules made under the Act shall be laid before the State Legislature may make during the section in which they are so laid or the section immediately. The rules under question are laid before the State Legislature. Therefore the said Rules are legal and intra vires under Article 301 of the Constitution of India.

3.4 He has also relied upon the recent judgment of the Hon'ble Supreme Court in the case of UGAR SUGAR WORKS LTD vs. DELHI ADMINISTRATION AND OTHERS reported in (2001) 3 SCC 635. He has relied upon para 13 where the Hon'ble Apex Court has observed as under:

> "That there is no fundamental right to trade in intoxicants, like liquor, has been conclusively held by this Court in State of A.P. v. McDowell & Co. where taking note of some of the earlier Constitution Bench decisions of this Court, the argument that a citizen of this country has a fundamental right to made in intoxicant liquor was once again emphatically repelled. That issue

is thus, no longer res integra. The following observations of the Bench in McDowell case are educative:

"39. The contention that a citizen of this country has a fundamental right to trade in intoxicating liquors refuses to die in spite of the recent Constitution Bench decision in Khoday Distilleries. It is raised before us again. In Khoday Distilleries this Court reviewed the entire case-law on the subject and concluded that a citizen has no fundamental right to trade or business in intoxicating liquors and that trade or business in such liquor can be completely prohibited. It held that because of its vicious and pernicious nature, dealing in intoxicating liquors is considered to be res extra commercium (outside commerce). Article 47 of the Constitution, it pointed out, requires the State to endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and all drugs which are injurious to health. For the same reasons, the Bench held, the State can treat a monopoly either in itself or in an agency created by it for the manufacture, possession, sale and distribution of liquor as a beverage. The holding is emphatic and unambiguous. Yet an argument is sought to be built upon certain words occurring in clauses (e) and (f) of the summary contained in para 60 of the decision. In these clauses, it was observed that creation of a monopoly in the State to deal in intoxicating liquors and the power to impose restrictions, limitations and even prohibition thereon can be imposed both under clause (6) of Article 19 or even otherwise. Seizing upon these observations, Shri Gangulay argued that this decision implicitly recognises that business in liquor is a fundamental right under Article 19(1)(g). If it were not so, asked the learned counsel, reference to Article 19(6) has no meaning. We do not think that any such argument can be built upon the said observations. In clause(e), the Bench held, a monopoly in the State or its agency can be created `under Article 19(6) or even otherwise. Similarly, in clause(f), while speaking of imposition of restrictions and limitations on this business, it held that they can be imposed `both under Article 19(6) or otherwise'. The said words cannot be read as militating against the express

propositions enunciated in clauses (b), (c), (d), (e) and (f) of the said summary. The said decision, as a matter of fact, emphatically reiterates the holding in Har Shanker that a citizen has no fundamental right to trade in intoxicating liquors. In this view of the matter, any argument based upon Article 19(1)(g) is out of place."

3.5 Thereafter the Hon'ble Apex Court has relied upon another judgment in the case of Har Shankar v. Dy.Excise and Taxation Commissioner reported in (1975) 1 SCC 737 and then in paragraphs 16, 22 and 24 the Hon'ble Apex Court has observed as under:

"Para.16 In view of this settled position of law, any argument impugning the policy decision of the State Government, as reflected in the impugned notification, based upon Article 19(1)(g) is totally out of place and merits outright rejection and we have no hesitation in doing so most emphatically.

Para.22 The State has every right to regulate the supply of liquor within its territorial jurisdiction to ensure that what is supplied is "liquor of good quality" in the interest of health, morals and welfare of the people. One of the modes for determining that the quality of liquor is "good" is to ascertain whether that particular brand of liquor has been tested and tried extensively elsewhere and has found its acceptability in other States. The manner in which the Government chooses to ascertain the factor of higher acceptability, must in the very nature of things, fall within the discretion of the Government so long as the discretion is not exercised mala fide, unreasonably or arbitrarily.

Para 24.... It is not within the province of this Court to lay down that the executive policy must always remain static, even if its revision is "just, fair and reasonable". What is relevant is to find out whether the executive action is mala fide, unreasonable or irrational as a criterion. As already observed the court in exercise of its power of judicial review cannot sit in judgment over the policy of administration except on the limited grounds already noted. Each State is empowered to formulate its own liquor policy keeping in view the interest of its

citizens. Determination of wide-scale acceptability of a particular brand of liquor, on the basis of National Sales Figures, does not strike us as being unreasonable, much less irrational. The basis for determination is not only relevant but also fair. No direction can be given or expected from the court regarding the "correctness" of an executive policy unless while implementing such policies, there is infringement or violation of any constitutional or statutory provision. In the present case, not only is there no such violation but on the other hand, the State in formulating its policy has exercised its statutory powers and applied them uniformly."

3.6 Learned counsel for the respondent has also relied upon the Division Bench judgment of this Court in the case of CHANDULAL JETHALAL JAYASWAL v. THE STATE OF GUJARAT reported in 1963 (4) GLR 1033 on page 1050 the Court has observed as under:

"Every case must be judged on its own facts and in its own setting of time and circumstance, and it might be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolized remained absolutely free. The result of these decisions is that legislation, Federal or State, infringes the freedom of trade, commerce or intercourse where it operates directly but not merely incidentally to burden, hamper or prevent persons or corporations engaged in the trade or commerce across the State boundaries and that trade and commerce can be regulated unless such regulation is pressed to the point of impairing true freedom of inter-State trade and commerce. A regulatory measure would not collide with the freedom of trade merely because inter-State trade or commerce might be affected consequently. To put it in another way, freedom as at State boundaries had no narrower meaning than that there should not be imposed prohibitions, restrictions and burdens preventing, imeding or prejudicing the passing from State to State of trade, commerce and intercourse (cf. W.A. Wynes; Legislative, Executive and Judicial Powers in Australia,

Second Edition 373 to 374)."

3.7 He has also relied upon the Division Bench judgment (unreported) of this Court in Special Civil Application No.1232 of 1966 decided on 24.4.1970 (Coram: J.B.Mehta and A.D.Desai, JJ.) while considering the constitutional validity of Secs. 59-AA, 59-C and 59-D of the Prohibition Act and on internal page 7 the Court has observed as under:

"In the present case the restrictions have been placed by the provisions of section 59-AA with a view to regulate the trade so as to prevent the articles being used as substitute for the intoxicating liquor and to regulate genuine sale. The restrictions, therefore, are reasonable and in the interest of public. Mr.Nanavati appearing for the State has drawn our attention to letter dated January 21, 1960 written by the Under Secretary, Government of India to the Secretary to the Governor of Bombay, stating that the President has assented to the Bombay Prohibition Amendment Bill, 1959. The Bill has been subsequently enacted by the State Legislature as Act 22 of 1960. After the Act was enacted the President has also given his assent on 28th April 1960. Thus all the essential conditions of Article 304(b) are fulfilled in the present case and the Legislature was competent to enact Act 22 of 1960. Consequently the provisions of section 59-AA of the Act and the Rules made thereunder are valid and intra vires."

CONCLUSIONS:-

4. I have considered the rival submissions of both the learned advocates for the petitioner and the respondent. It is no doubt true that Article 19(1)(g) provides freedom of profession, trade and business but this freedom means that every citizen has the right to choose his own employment or to take up any trade or calling, subject only to the limits as may be imposed by the State in the interests of the public welfare and the other grounds mentioned in Cl.(6). It may be noted that Clause 6(i) provides professional or technical qualifications which reads as under:

"Cl.(6)(i) :- As a result of the amendment of this Clause in 1951, it has been made clear that if the State lays down professional or technical qualifications for entering into any trade or

business, it will not be open to an aggrieved person to challenge such restriction as unreasonable.

Clause (6)(ii) provides Trading by the State :-

Since Art.19(1)(g) declares that every citizen has the right to carry on any trade or business, the right would obviously be impaired if the State itself seeks to carry on a trade or business ousting private traders from that trade, wholly or partially. Hence, under the original Cl.(6), such action on the part of the State could be justified only if it was reasonable.

4.1 So the freedom under Article 19(1)(g) is not absolute freedom but the qualified freedom. There are certain activities which are so inherently pernicious that nobody can be considered to have a fundamental right to carry them on as a trade or business, e.g. betting and gambling, dealing in intoxicants. (Re. judgment of the Hon'ble Apex Court in the case of Khoday Distilleries Ltd. vs. State of Karnataka reported in (1995) 1 SCC 574. The judgment cited by the learned advocate for the respondent in the case of Ugar Sugar Works Ltd. Vs. Delhi Administration (supra) give complete answer to the contention of the learned advocate for the petitioner where the Hon'ble Apex Court has also considered the principle and relied upon the earlier decision of Har Shanker vs. Dy.Excise and Taxation Commissioner reported in (1975) 1 SCC 737.

4.2 Article 47 provides status of the State to raise the level of nutrition and the standard of living and to improve public health. The said article provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

5. I have also considered the provisions of Rules and also judgment of the Hon'ble Supreme Court in the case of Ugar Sugar Works (supra) and also the Division Bench judgment of this Court in the case of Chandulal Jethalal Jayaswal (supra). I have also considered the contentions of the State in the affidavit-in-reply also in this behalf. The restrictions put by the State particularly to have excise escorts when the goods entered in the State of Gujarat is a reasonable

restriction in this behalf. The petitioner has not been able to successfully prove any infringement of fundamental rights in this behalf. In view of the judgment of the Hon'ble Apex Court, none of the contention of the petitioner survives in this behalf and all the contentions raised by the respondents are squarely answered by the Hon'ble Supreme Court in this behalf.

5.1 At this stage I would like to quote Mr.H.M.Seervai commentary on Constitutional Law of India Volume 2 Fourth Edition page 2014 where in para 17.155 the learned Author considered the Nashirwar's case and also observations of Das C.J., after observing the same the learned Author has observed like this :

"It will be seen that if there is no fundamental right to carry on trade in liquor, no question of reasonable restrictions on that right can arise. It is submitted that the question "Can there be trade or business in intoxicating liquor?" is ambiguous, and its answer depends upon the situation in which it is asked. If the impugned law permits the use of, and trade in, intoxicating liquor under regulation, the question answers itself - "Of course there can be trade in liquor, since it is allowed to be bought and sold". But if the impugned law prohibits the use of, or trade in, intoxicating liquor, the question acquires a different meaning. It means: "Is intoxicating liquor an article of such a nature that the law can with propriety treat it as res extra commercium (outside commerce)?" Opinions may differ on this question. But, in India, there are two reasons for answering it in the affirmative. First, the character of alcohol as a narcotic or a depressant; secondly, the directive in Art.47. For, it would be incongruous to speak of intoxicating liquor as an object of commerce, entitled to the protection of fundamental rights as to property and trade, when a directive principle, which is also fundamental in the governance of the country, makes it the duty of the State to secure the prohibition of the consumption of intoxicating drinks. The directive in Art.47 is absolute - it is not dependant upon proving circumstances which justify prohibition. It is submitted that for the reasons given above there can be no fundamental right of property or trade in intoxicating liquor. The practical consequence of holding that

there is a fundamental right of property and trade in liquor, and holding that in view of Art.47 it is reasonable to prohibit the exercise of that right, is the same. This view encourages futile challenges to the reasonableness of restrictions imposed by liquor laws."

6. In view of my conclusion on Article 19(1)(g) of the Constitution of India, Article 47 of the Constitution of India and also the judgment of the Hon'ble Apex Court in the case of Ugar Sugar Works and Division Bench judgment of this Court in the case of Chandulal Jethalal Jayaswal and also commentary of Mr.H.M.Seervai on Article 47 of the Constitution of India, I am of the view that contentions of the petitioner based on Rule 10 which provides that no consignment shall be transported by road through the intervening territory of the State unless it is accompanied by the excise escort which shall be provided on payment by the transporter of the cost of the same in advance. It was also provided that the same has been provided on an application being made in this behalf by the transporter to the local prohibition and excise officer of the charge in which the place where the consignment shall first enter by road in the State of Gujarat is situated is illegal, is without any basis. In my view the said action is a reasonable restriction because there is no fundamental right to carry on business of liquor as far as State of Gujarat is concerned. However, in any view of the matter the said rule provides a reasonable restriction in this behalf. There is no substance in the contention of the petitioner in this behalf in fact Rule 10 also valid. It puts reasonable restriction even if it is assumed that the petitioner has right to carry on business of liquor in this behalf (however the State of Gujarat is concerned the petitioner has no fundamental right as held by me in this behalf) in view of the Bombay Prohibition Act which provided restriction to carry on business of liquor.

7. In view of the same there is no substance in the contention of the learned counsel for the petitioner and, therefore, the petition is required to be dismissed. In view of the same the petition is dismissed. Rule is discharged. No order as to costs. Interim relief if any granted earlier shall stand vacated.

(K.M. Mehta, J.)

syed/